United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7367

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United States Court of Appeals

For the Second Circuit

Docket No. 75-7367

ROBERT P. KOCH, KEVIN P. RYAN, JOHN J. WILSON, Captains of Police, PHILIP BOHRER, JAMES L. JUDGE, WILLIAM WIESE, Lieutenants of Police, RICHARD BECK, JOSEPH BIRBIGLIA, CHARLES CASEY, JAMES CLARK, EDWARD EASTWOOD, JOHN GALANTINI, RONALD GOLDNER, REGINALD GREENIDGE, RUSSELL HOFFMAN, JAMES KEELS, JOHN MURRAY, LAWRENCE PALLADINO, Sergeants of Police, New York City Transit Authority,

Plaintiffs-Appellants,

- against -

DAVID L. YUNICH, Chairman and Chief Executive Officer, New York City Transit Authority, and ALPHONSE E. D'AMBROSE, Personnel Director and Chairman of the Civil Service Commission, City of New York,

Defendants-Appellees.

BRIEF FOR PLAINTIFF-APPELLANTS

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Defendants-Appellees.

BRIEF FOR PLAINTIFF-APPELLANTS

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (24*) made on June 20, 1975 by Bruchhausen, D.J. in his chambers upon the application there by counsel for the defendants below. The action was commenced by an order to show cause made by Judd, D.J. of the same Court on June 14, 1975 dir-

*Numerical references contained in parentheses ( ) throughout are to page numbers of the Record on Appeal in this case.

ecting that counsel "be heard" on the question "why an order should not be entered directing the relief requested by plaintiffs against defendants" in the handwriting of Judge Judd "in Court Room 11 [the courtroom assigned to Judge Judd] on June 20, 1975," a time about one hour after Judge Bruchhausen had finally disposed of the case in his chambers (21-22).

QUESTIONS PRESENTED ON APPEAL

1. Whether or not the complaint contains a plain statement showing that plaintiffs are entitled to relief.

2. Whether or not the complaint is subject to dismissal for insufficiency if relief can be granted under any set of facts that can be established in support of its allegations.

STATEMENT OF THE CASE

This action was brought by a verified complaint seeking relief under the Civil Rights Act, 42 U.S.C. §§ 1983 to enjoin certain administrative action threatened to be taken under color of State law depriving plaintiffs of their rights, privileges and immunities secured by the Constitution of the United States for declaratory judgment that certain provisions of the State Civil Service Law are null and void in their threatened application to plaintiffs, for a three-judge court to be convened to hear and determine this proceeding, and for an interlocutory injunction pending the hearing and determination of this proceeding.

A Termination Directive was issued by the respondent City Personnel Director proposing the order of layoff and demotion for civil service employees whose jobs were to be abolished. On May 22, 1975, pursuant to this directive, a layoff and demotion list was caused to be compiled by the respondent Chairman and Chief Executive Officer of the New York City Transit Authority containing the names of ten of the petitioners, preceded by the announcement, "each of the following superior officers will be demoted one rank". On the same date, copies of the list were forwarded to Mr. K. Jenkins, Director of Personnel Administration of the New York City Transit Authority.

The Verified Complaint

The Verified Complaint contains twenty-seven numbered paragraphs, and a "wherefore" clause:

Paragraph FIRST alleges that the plaintiffs hold the three different positions set forth in the caption in the competitive service under the government of the State of New York, and indicates the residences of the eighteen plaintiffs (2).

Paragraph SECOND identifies the defendant YUNICH in his governmental position (2-3).

Paragraph THIRD does the same for defendant D'AMBROSE (3).

Paragraph FOURTH sets forth that this action is brought under specified provisions of the Constitution and statutes of the United States (3):

- ¶ "An Act to enforce the Provisions of the Fourteenth Amendment, and for other Purposes," 17 Stat. 13 [April 20, 1871], R.S. § 1979, 42 U.S.C. §§ 1983, 1985(3);
- ¶ Constitution of the United States, Amendment XIV, Sections 1 and 5;
- ¶ 28 U.S.C. §§ 1343(3), 2201 and 2202, for declaratory judgment that a certain provision of the State Civil Service Law is null and void in its threatened application to plaintiffs; and
- ¶ 28 U.S.C. §§ 2281 and 2284, for the convening of a three-judge court to hear and determine this proceeding.

Paragraph FIFTH alleges the appointment of the plaintiffs pursuant to a historic provision of the State Constitution requiring that such designation be made pursuant to merit and fitness, limitations of amendments to that provision with respect to veterans, and the State statute governing the appointment of plaintiffs (4-5).

Paragraph SIXTH alleges the date of appointment pursuant to these provisions of each plaintiff (5).

Paragraph SEVENTH alleges the statutory provisions of the State governing suspension or demotion among in-

cumbents on account of abolition of their positions as "the inverse order of original appointment on a permanent basis" to such positions, and the recent substitution of a new basis for such suspension or demotion that amounts not to seniority in the position but instead longevity on the public payroll (6).

¶ Paragraph EIGHTH describes the administrative action taken by the defendant City Personnel Director in 1974 to establi[illegible]y-off lists", and the scheduling of demotion of plaintiff Captains of Police notwithstanding their seniority in that position over other Captains not so scheduled (6-7).

¶ Paragraph NINTH does the same for the plaintiff Lieutenants of Police (7)

¶ Paragraph TENTH does the same for the plaintiff Sergeants of Police (7-8).

¶ Paragraph ELEVENTH alleges the conflict between the historic State Constitutional provision on merit and fitness and the directive of the defendant City Personnel Director, and the effect of successive demotions, or "bumping", ordered by that directive upon the plaintiffs compared with other incumbents with less seniority (9).

¶ Paragraph TWELFTH alleges in detail the effect on the respective permanent positions held by plaintiffs of the directive of the defendant City Personnel Director that is set forth in an appendix to the Complaint (10-11, 20).

¶ Paragraph THIRTEENTH sets forth facts concerning the promotion of more than two hundred police officers and an annual expense of nearly seven hundred thousand dollars by defendant Chairman and Chief Executive Officer, New York City Transit Authority, all without competitive examination (11-12).

¶ Paragraph FOURTEENTH alleges the conflict between the State Constitutional policy of merit and fitness and the action of the defendant Chairman (12-13).

¶ Paragraph FIFTEENTH alleges the threatened demotion of the plaintiffs and details the loss in annual wages as a consequence to them, individually and collectively (13-14).

¶ Paragraph SIXTEENTH compares the collective cost of the allegedly unlawful demotion of plaintiffs with that of the promotions made outside competitive examination (14).

¶ Paragraph SEVENTEENTH sets forth the historic State Constitutional prohibition against impairment or diminution of the benefits of a pension or retirement system that is declared a contractual obligation, and the statutory membership in such system of the plaintiffs (15).

¶ Paragraph EIGHTEENTH alleges facts concerning the proposed demotion of plaintiff Sergeants of Police, one-third of whom are black, with the consequent denial to these plaintiffs of the equal protection of the laws (15).

¶ Paragraph NINETEENTH alleges facts that give rise to denial to all plaintiffs of the equal protection of the laws by comparison of the impact upon them as younger officers with older ones eligible for retirement under the proposed action of the defendants (16).

¶ Paragraph TWENTIETH alleges facts that give rise to denial to all plaintiffs of the equal protection of the laws by comparison of the impact upon them as superior officers with patrolmen under the proposed action of the defendants (16).

¶ Paragraph TWENTY-FIRST alleges facts concerning the unreasonableness, arbitrariness and capriciousness of the proposed action of the defendants (17).

¶ Paragraph TWENTY-SECOND alleges that under the Constitution of the United States, public employment under a State or its political subdivision is protected against loss in an arbitrary and discriminatory manner, and the threatened separation of plaintiffs from their positions is arbitrary, capricious, unreasonable, contrary to law and constitutes a denial of due process of law, consider-

in a substantive sense, under the Fourteenth Amendment (17).

¶ Paragraph TWENTY-THIRD alleges that under the Constitution of the United States, the threatened demotion of the plaintiffs constitutes a denial of the equal protection of the laws (17).

¶ Paragraph TWENTY-FOURTH alleges that under the Constitution of the United States the threatened demotion involves loss, diminution and impairment of pension rights, characterized as a contractual right under the State Constitution, and constitutes the impairment of the obligation of contracts under Article I., Section 10, as well as deprivation of property without due process of law, again considered in a substantive sense, under the Fourteenth Amendmen

¶ Paragraph TWENTY-FIFTH alleges that the threatened demotion of plaintiffs without any hearing whatsoever deprives each of them of property without due process of law, considered in this instance in a procedural sense, under the Fourteenth Amendment (17-18).

¶ Paragraph TWENTY-SIXTH alleges that plaintiffs have no adequate remedy at law (18).

¶ Paragraph TWENTY-SEVENTH explains why the action is being commenced by order to show cause (18).

¶ The "wherefore" clause seeks the convening of a three-judge court, pursuant to 28 U.S.C. §§ 2281 and 2284, a permanent injunction against defendants'proceeding with the proposed demotion of plaintiffs, a declaratory judgment on behalf of plaintiffs that those of State statutes mandating demotion or separation from service of plaintiffs on any basis other than merit and fitness and seniority in a position held on a permanent basis be held null and void, a preliminary injunction pending hearing and determination, and for other just and proper relief (18-1).

The Decision of the Court Below

After hearing counsel in his chambers, a order was made by the District Court below dismissing this complaint (24). No pleading to this complaint has ever been made by either defendant. No memorandum or opinion was filed by the Court below. At the conclusion of argument, the District Judge commented that the case involved "State issues".

A R G U M E N T

P O I N T I

The complaint contains a plain statement of claims showing that plaintiffs are entitled to relief.

According to the verified complaint, facts are set forth concerning the proposed demotion and separation of the plaintiffs from their public positions held on a permanent basis under the State by action of defendant D'Ambrose with his directive (20) and of defendant Yunich with his demotion list made pursuant to that directive (13-14) that show plaintiffs are entitled to relief under four rights guaranteed them by the Constitution of the United States:

> [i] The right not to be deprived of property without due process of law, considered in a substantive sense, under Amendment XIV, Section 1.

The facts alleged show that plaintiffs below hold public employment under the State on a permanent basis pursuant to appointment on the basis of merit and fitness prescribed by State Constitutional and statutory provisions for more than eighty years (4-5). Of equal historicity

is the provision governing suspension or demotion of public employees on account of abolition of their positions contained in the old Civil Service Act of 1909 and under which plaintiffs were appointed to their present permanent positions. This provision, consistent with the State Constitutional mandate of merit and fitness, required suspension or demotion on the basis of the inverse order of appointment to the permanent position, and not on any other basis (6). For more than three-quarters of a century, this basis was the only standard for suspension or demotion upon the occasion of abolition of public positions, for budgetary or other reasons. The directive of the defendant D'Ambrose below (20) proposes a new and different basis - longevity on the public payroll rather than seniority in the permanent position that is undertaken to be abolished. The complaint alleges that the proposed demotion or suspension of plaintiffs is in fact arbitrary, capricious and unreasonable (17), and constitutes a denial of due process of law, considered in a substantive sense, under the Fourteenth Amendment (17).

Referring to oft-quoted language that there is no constitutional right to public employment, the Court observed in Wieman v. Updegraff, 344 U.S. 183 at 191-192 (1952);

"To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. * * * We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

In Slochower v. Board of Higher Education, 350 U.S. 551 (1956), the Court again reversed denial by a State or its political subdivision of public employment on any basis that is arbitrary in fact. Said the Court [350 U.S. at 556, 559]:

"But in each of these cases it was emphasized that the State must conform to the requirements of due process. * * * This case [Wieman, supra] rests squarely on the proposition that 'constitutional protection does extend to the public servant whose exclusion pursuant to statute is patently arbitrary or discriminatory.' 344 U.S. at 192. * * *

"[T]he discharge falls of its own weight as wholly without support. There has not been the 'protection of the individual against arbitrary action' which Mr. Justice Cardozo characterized as the 'very essence of due process.' Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 302."

Additional facts bearing on the arbitrary, unreasonable and capricious nature of the proposed departure by the defendants from the historic Constitutional and statutory standard of merit and fitness and seniority in a permanent position on the occasion of demotion because of abolition of such position are set forth in the complaint. More than two hundred patrolmen have been designated under the authority of the defendant Yunich to receive additional annual compensation amounting to nearly $700,000 (12). Unlike each of the plaintiffs, none of these employees have been selected on the basis of competitive examination prescribed by the State Constitution (13). The budgetary saving by permitting the favored two hundred to revert to their permanent positions and the only ones earned by them on the basis of merit and fitness ascertained by competitive examination would amount to 800 percent more than that proposed to be realized by demotion collectively of all of the plaintiffs from positions that they hold permanently on the basis of competitive examination and in which they enjoy seniority over others not proposed to be demoted (14).

[ii] The right of plaintiffs against impairment of the obligation of their contracts with respect to pension rights by the proposed State action for their demotion, under Article I., Section 10.

Closely related to deprivation of property by the arbitrary, capricious and unreasonable formula for demotion of plaintiffs proposed by defendants, is the impairment of the obligation of their contracts for retirement alleged in the complaint as a violation of Article I., Section 10 of the Constitution of the United States (14-15, 17-18). A generation before the promotion of the plaintiffs to their present

permanent positions, the people of the State made membership in a retirement system under a civil division of the State "a contractual obligation," and explicitly mandated that its benefits "shall not be diminished or impaired"(14-15). Collectively, plaintiffs stand to lose about $45,000 annually after retirement under defendants' proposed demotion of them (14). The proposed action flatly violates the prohibition against State action impairing the Obligation of Contracts contained in the Constitution of the United States, and this is explicitly set forth in the complaint (18). Wood v. Lovett, 313 U.S. 362 (1941).

[iii] The right of plaintiffs against denial to them of the equal protection of the laws by the proposed action of defendants under authority of the State, contrary to Amendment XIV, Section 1.

The complaint sets forth facts giving rise to denial to them of the equal protection of the laws under the demotion and suspension of plaintiffs proposed by defendants, in two different respects:

(a) Discrimination on the basis of race and color. Fully one-third of the plaintiff Sergeants are black, members of a minority group, and, as such more recent entrants into civil service with consequent less longevity on the public payroll than their non-minority colleagues (15). These plaintiffs, notwithstanding the recency of their entrance into government service, nevertheless enjoy seniority over a number of others in the identical permanent position who are not proposed to be demoted or suspended by the proposed action of defendants (15).

(b) Discrimination on the basis of merit and fitness determined by competitive examination. Under the dir-

ective of defendant D'Ambrose (20), patrolmen are to be demoted or suspended and placed upon a preferred list solely upon the basis of seniority as determined by their position on a civil service list established pursuant to the State Constitution upon the basis of merit and fitness ascertained by competitive examination. Plaintiffs, holding higher positions on a permanent basis, are proposed to be demoted on a different basis - not upon their seniority in their positions determined by merit and fitness after competitive examination, but rather upon the basis of longevity on the public payroll, whether or not that longevity began by appointment pursuant to merit or fitness, or even whether the longevity was in the police service of the New York City Transit Authority, or, indeed, in any other police service (16).

Additionally, with respect to the preferred two hundred enjoying annual compensation above their permanent positions amounting to eight times that of plaintiffs (12-14), two classes of employees of the New York City Transit Police are established by the directive and action of defendants- plaintiffs who hold their positions on a permanent basis with compensation determined upon selection after competitive examination, and the group enjoying annual additional compensation on the basis of preferment and not competitive examination who are totally exempt from demotion or suspension under the proposed action of defendants (11-12).

The denial of the equal protection of the laws is set forth in the complaint as contrary to the Constitution of the United States (17). See Wieman v. Updegraff, supra, 344 U.S. 183 at 191-192; Slochower v. Board of Higher Education, supra, 350 U.S. 551, at 556, 559.

> [iv] The right not to be deprived of property in the form of public employment and pension rights without due process of law, considered in a procedural sense, that requires a pre-termination hearing under Amendment XIV, Section 1.

Neither the State statutes under which the proposed action of suspension or demotion of plaintiffs is purported to be taken, nor the directive of defendant D'Ambrose (20), nor the lay-off lists drawn up under the authority of defendant Yunich (6-7) make any provision whatsoever for any pre-termination hearing before depriving plaintiffs of salary and pension rights.

A long line of cases, sometimes called the Fuentes-Goldberg line, have supplied uniform precedent for protection of formerly unprotected "privileges" against State deprivation without a pre-termination hearing mandated by the due process clause of the Fourteenth Amendment. These cases include Bell v. Burson , 402 U.S. 535 (1971) [suspension of registration and driver's license by State without pre-termination hearing]; Fuentes v. Shevin, 407 U.S. 67 (1971) [ex parte seizure of chattels on posting double-security bond]; Goldberg v. Kelly, 397 U.S. 254 (1970) [suspension of welfare funds]; Sniadach v. Family Finance Corp., 395 U.S. 337 [garnishment of employee's wages]. The public employee cases, though somewhat sui generis, have generally followed the Fuentes-Goldberg line of reasoning. Perry v. Sindermann, 408 U.S. 593 (1972) [State refusal to renew non-tenured instructor's contract]. The leading case in this area is Arnett v.Kennedy, 416 U.S. 134 (1974), which involved the discharge of a federal employee under the pro-

visions of the Lloyd-LaFollette Act, 5 U.S.C. § 7501. Although the discharge was upheld, the rationale of that case is by no means clear in the light of the five separate opinions filed that occupied nearly one hundred pages of the United States Reports. The most recent three-judge federal construction of the requirement of procedural due process that has been reported since Arnett has upheld a pre-termination hearing as essential for removal of a State employee. Eley v. Morris, 300 F. Supp. 913 (D.C.N.D. Ga., decided Feb. 13, 1975).

P O I N T I I

The complaint is not subject to dismissal for insufficiency if relief can be granted under any set of facts that can be established in support of its allegations.

Even though the District Court below may have entertained doubts - however well-supported or ill-founded - that plaintiffs would not ultimately prevail upon the claim stated in their complaint, the complaint may not lawfully be dismissed for insufficiency if relief may be granted under any set of facts that can be established under its allegations. The rule has been clearly stated in Conley v. Gibson, 355 U.S. 41 at 45 (1957), and has been enunciated "literally hundreds of times," 5 Wright & Miller, Federal Practice and Procedure: Civil §§ 1215, 1216. This is especially the case in a proceeding such as the instant one in which there has been no pleading whatsoever by defendants.

The leading case, of course, is from this Court and its opinion by Judge Clark, the draftsman of the Federal Rules of Civil Procedure, Dioguardi v. Durning, 139 F.2d 774 (1944). Dioguardi was the consignee of a shipment of "tonics" that was tied up in customs for his failure to pay charges that he insisted should have been paid by the shipper. The defendant Collector of Customs sold the goods a year later at auction. Dioguardi, who had limited command of English, scorned the assistance of counsel and brought suit against the Collector with his own "obviously home drawn" complaint. In that complaint he alleged that on the day of the auction the Collector "sold my merchandise to another bidder with my price of $110, and not of his price of $120." He also alleged that "three weeks before the sale, two cases, of 19 bottles each case disappeared." The United States Attorney moved to dismiss the complaint on the ground that it "fails to state facts sufficient to constitute a cause of action." The court below granted the motion with leave to amend. Dioguardi reiterated his claims, "with an obviously heightened conviction that he was being unjustly treated", in an amended complaint. The second complaint was also dismissed, and final judgment entered for the defendant. This Court reversed. Speaking through Judge Clark, the Court said that Dioguardi had "stated enough to withstand a mere formal motion, directed only to the face face of the complaint, and that here is another instance of judicial haste which in the long run makes waste.

* * * We think that, however inartistically they may be stated, the plaintiff has disclosed his claims that the collector has converted or otherwise done away with two of his cases of medicinal tonics and has sold the rest in a manner incompatible with the public auction he had announced - and indeed required * * *". Id., at 775.

Critics of this enunciation of the modern philosophy of pleading in the Federal Courts have made much of the fact that after reversal by this Court Dioguardi went to trial, failed to prove his claims, and a judgment was entered against him and affirmed by this Court. Dioguardi v. Durning, 151 F.2d 501 (1945). The Advisory Committee on Civil Rules has explicitly approved the language of Judge Clark in Dioguardi that "under the new rules of civil procedure, there is no pleading requirement of stating 'facts' sufficient to constitute a cause of action', but only that there be 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" Id. at 775. Said the Committee, "The complaint in that case stated a plethora of facts and the court so construed them as to sustain the validity of the pleading." Note to Rule 8(a), Advisory Committee Report of October, 1955. Recently, the highest court has cited Dioguardi with approval. Haines v. Kerner, ____ U.S. ____, _____, 92 S.Ct. 594 at 596, 30 L.Ed.2d 652 (1972).

There remains the question of subject-matter jurisdiction raised by the oral remark of the Court below that this case involves "State issues". Because Federal Courts are ones of limited rather than general jurisdiction of state courts, there is a requirement not commonly found in the states that

a pleading contain a short and plain statement of the grounds upon which the Court's jurisdiction depends. Rule 8(a)(1), Federal Rules of Civil Procedure. This has been explicitly done in paragraph FOURTH of the complaint that makes four separate references to seven specified sections of the United States Code, as well as two specified sections of the Constitution of the United States (4). A judgment of dismissal for insufficiency of a complaint is plainly erroneous. See Mims v. Kemp, 516 F.2d 21 (4th Cir. 1975).

C O N C L U S I O N

The order of the Court below dismissing the complaint should be reversed in all respects.

Respectfully submitted,

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